TWO ACTIONS,

BETWEEN

JOHN HOWE, Esq.

AND

GEORGE LEWIS DIVE, Esq.

Tried by a SPECIAL JURY,

Before Lord *MANSFIELD*,

At the ASSIZES holden at CROYDON, on *Wednesday* the 15th of *August*, 1781.

THE SECOND EDITION.

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Rec. June 20, 1904

AS a partial and mutilated Account of these Trials appeared in the News-Papers, the Friends of Mr. HOWE have requested him to publish the whole of both Causes faithfully taken in Short-Hand; that the Publick may be enabled to judge of those Verdicts which have done Justice to his injured Character.

A

THE SPECIAL JURY.

JOHN THORNTON, Eſq.
SAMUEL SWABEY, Eſq.
JAMES BOURDIEU, Eſq.
JOHN RUSS, Eſq.
ATWOOD WIECHSELL, Eſq.
JAMES EVELYN, Eſq.
WILLIAM HAMMOND, Eſq.
RICHARD LADBROOKE, Eſq.
ROBERT HUDSON, Eſq.
SIR JOSEPH MAWBEY, Bart.
JAMES BULEOCK, Eſq.
GEORGE SUMNER, Eſq.

Mr. BOND.

MAY it pleaſe your Lordſhip, and you Gentlemen of the Jury,

JOHN HOWE, Eſq. is the Plaintiff, and GEORGE LEWIS DIVE, Eſq. is Defendant.

The Declaration ſtates, that the Defendant, upon the 24th of May laſt, at Epſom, in this county, aſſaulted, beat, and ill-treated, the Plaintiff, for which he lays his damage at 500*l*. The Defendant has pleaded that he is not guilty, and thereupon the iſſue is joined.

Mr. PECKHAM.

Gentlemen of the Jury,—The pleadings have explained to you the nature of this action, which is for an aſſault: and I am ready to admit, that it has not been attended with great perſonal violence. You therefore will probably aſk, why Mr. Howe has preſumed to ſummon you here, to determine a queſtion in itſelf ſo plain, and ſo ſimple, that men of the moſt ordinary underſtanding would be fully competent to decide? Permit me Gentlemen in anſwer to obſerve, that the ſituation of the parties, and the conſequence of your verdict, make this cauſe of ſuch real importance, that it requires your moſt ſerious attention, and unbiaſſed judgment; for this is not a cauſe between two country fellows, who have got drunk and fought in an alehouſe; it is not a diſpute between two gamblers, one of whom has been whipped off the courſe for cheating the other; but it is a queſtion between two Gentlemen, in every ſenſe of the word Gentlemen.

Mr. Howe is a young man of a liberal education, high rank, and great expectations.

Mr. Dive has been an Officer, and is now a country Gentleman, bleſſed with an ample fortune and reſpectable character.

Thoſe Gentlemen were both at the races at Epſom, and by accident were at the ſame time in the ſame ſtand. Mr. Howe, by accident trod on the toe of Mr. Dive; an accident, for which politeneſs requires an apology, and which is all that Gentlemen demand. Mr. Howe, the moment he perceived what he had done, turned round to make that apology, intending to vary the phraſe of it, according to the knowledge he had of the perſon whom he had thus innocently trodden on. I am ſorry to ſay, Mr. Dive would not permit him to do it; but from the natural irritability of his temper, or from a too quick ſenſe of honour which he had acquired by a military education, or from a ſharp ſenſe of pain, he did very precipitately ſtrike Mr. Howe, and immediately repeated his blow.

Mr. Howe ſaw that he could not cope with him in perſonal ſtrength, and therefore prudently retired from the Defendant, who ſeemed to be actuated by no other influence than drunkenneſs or phrenzy. For this aſſault, thus circumſtanced, Mr. Howe has dared in defiance of the ridicule and ſcoffing of the unthinking, in defiance of Modern Honour, to apply to the laws of his Country; and thinks himſelf bound, as a Chriſtian and a Citizen, to demand ſatisfaction of you: for notwithſtanding Mr. Dive had ſtruck him without reaſon, he did not wiſh to kill him without mercy: and Mr. Howe's good ſenſe told him, that if Mr. Dive had taken an opportunity to beat him, it was not neceſſary that he ſhould give him an opportunity to ſhoot him. I am well aware that if he had been an Officer, he would have been broke by a Court-Martial; even you and I, Gentlemen, in the moment of unthinking merriment might condemn Mr. Howe for his prudence; but neither you nor I can condemn him in a Court of Juſtice. I ſtand here as an Advocate doing my duty, and demand juſtice for my Client of you, who are bound by your duty to do juſtice to this injured Gentleman and the inſulted Laws. In reſpect to the aſſault itſelf, the evidence will be deciſive; for Mr. Dive has only ſaid upon the record, that he is not guilty. The fact will be proved, and cannot be contraverted: the only queſtion therefore for your enquiry will be what damages you ought to give for ſuch an injury.

Gentlemen, I do moſt ſeriouſly and ſolemnly conjure you to conſider the important conſequence of your Verdict. This is now a queſtion between the laws of your Country, and the laws of Modern Honour. You are publicly called on to determine, whether thoſe laws framed by the wiſdom of our anceſtors, and ratified by the experience of ages, are to be protected; or whether we are in future to obey thoſe laws which have originated in anger, in folly, and in faſhion? You, as a Jury, muſt diveſt yourſelves of all prejudice: I know you are ſuſceptible of thoſe opinions, which influence the minds of other men; but you muſt not bring thoſe ſentiments into a Court of Juſtice; you are bound by every religious and political tie to do your duty. Your verdict will determine, whether young men may fly to the laws of their country for protection and redreſs, or whether they muſt waſh off the ſtain of a blow, by the blood of the perſon who has given it. If you give ſmall damages, you tell Mr. Howe, that you diſapprove of his conduct in applying to the laws; you declare that a Jury will give him no ſatisfaction; but that if he is injured, he muſt in defiance of the laws of God and man carve out his own ſatisfaction, by plunging his ſword into the heart of the offender. Gentlemen, I could not ſay leſs on a queſtion of this nature: more I do not mean to ſay, becauſe I flatter myſelf, that the precedent which muſt this day be eſtabliſhed by your verdict, will induce his Lordſhip to lend his experience to guide your judgment, that you may be enabled to give ſuch damages, as at once will operate as a retribution to the injured, as a puniſhment to the delinquent, and as an example to the world.

The Reverend Mr. GREEN *ſworn.*

Examined by Mr. ERSKINE.

Q. Was you, Sir, upon Epſom courſe the 24th of May laſt, at the races?

A. I was at the laſt Epſom races; I forget the day, Sir; it was the laſt ſpring Epſom races.

Q. Do you know the perſon of the Defendant, Mr. Dive?

A. Very well, Sir.

Q. Do you know the perſon of the Plaintiff, Mr. Howe?

A. I now do.

Q. Did you ſee thoſe Gentlemen upon the courſe?

A. Not upon the courſe; upon the ſtand I did.

Q. At what time was that?

A. I think it was in the afternoon.

Q. Will you be ſo good as to ſtate to my Lord and

and the Jury what you ſaw, whether any thing happened between theſe parties?

A. I was talking with Mr. Dive, when he all at once turned to Mr. Howe, and ſtruck him with a ſtick he had in his hand.

Q. On a ſudden?

A. On a ſudden he gave him two or three ſevere blows.

Q. Did you ſee Mr. Howe aſſault Mr. Dive, or do any thing that could ſhew you the meaning of Mr. Dive's behaviour?

A. No, I did not.

Q. How near was you to Mr. Dive?

A. I believe at his elbow, or very near.

Q. Did you obſerve how near Mr. Howe was?

A. Not till he ſtruck him.

Q. You did not hear Mr. Howe ſay any thing, did you?

A. No.

Q. Nor do any thing to him?

A. I did not.

Q. You ſaw him turn round, and ſtrike Howe the Plaintiff?

A. I did.

Q. With a ſtick?

A. I did.

Q. What ſort of blows?

A. They were very ſharp blows for the inſtrument; but it was not a large ſtick.

Q. Was it repeated?

A. It was ſeveral times.

Q. Was it near the ſtairs?

A. It was not a large room; the ſteps muſt be within three or four yards.

Q. When Mr. Dive ſtruck at Mr. Howe, did you hear Mr. Howe ſay any thing?

A. No, not a word: he ſaid, Oh! or What! but nothing plain.

Q. He ſeemed ſurpriſed?

A. He ſeemed very much ſurpriſed.

Croſs-Examination by Mr. ROUS.

Q. Pray, Sir, did any language paſs at this time?

A. Yes, Sir.

Q. What was it, Sir?

A. I ſuppoſe I muſt ſpeak the words.

Q. Yes, ſpeak the whole.

A. Damn the raſcal! did you ever ſee ſuch a fellow? The damn'd ſcoundrel! turn him out of the ſtand.

Q. I would aſk you this queſtion: Did Mr. Dive, from what paſſed, ſtrike him merely from the accident of treading upon his toe; or did he impute to him any thing elſe?

A. Sir, he inſinuated a great deal more.

Mr. PECKHAM.

Q. Was Mr. Howe preſent at that time?

A. I believe at that time, Sir: but it was not long; for, as ſoon as he could get away, he did—he retreated two or three ſteps inſtantly.

Q. While Mr. Howe was preſent, you ſay, ſome other cauſe of offence was inſinuated?

A. I cannot ſay what the cauſe was; it appeared to me that there was ſomething elſe beſides.

Q. You, as a ſpectator, ſuſpected there was ſome other cauſe ſubſiſted between them?

A. I did.

Q. When that was done which you have expreſſed, did Mr. Howe demand any explanation?

A. He did not in my hearing.

Q. Did he fly?

A. He run, Sir.

Q. What was that cauſe of offence?

A. I aſked Mr. Dive what was the matter.

Mr. Peckham.—Did you aſk it while Mr. Howe was preſent?

A. I think it was not.

Mr. Rous.—You ſay while Mr. Howe was preſent, you underſtood ſome other cauſe of offence to be expreſs'd?

A. I did.

Q. What offence did you underſtand it was?

Mr. Peckham.—I muſt object to the queſtion: we are to hear facts, not Mr. Green's opinion.

Q. What did Mr. Dive ſay while Mr. Howe was preſent?

A. Damn the Scoundrel! or *Raſcal! Did you ever ſee ſuch a fellow! God damn him! turn him out of the ſtand.*

Mr. Peckham.—My Lord, that is our Caſe.

Mr.

Mr. ROUS.

May it pleaſe your Lordſhip and Gentlemen of the Jury to favour me on the part of the Defendant. And I confeſs this is a cauſe ariſing out of a ſubject on which I ſhould be happy if I could, conſiſtently with my duty, obſerve the ſame ſilence which my learned Friend's diſcretion has taught him to uſe.—Two actions are brought: the aſſault is firſt tried; yet the whole cauſe of the offence has been ſtudiouſly ſuppreſſed. A witneſs has been called, who could not ſpeak with the preciſion the other Witneſſes could; which my learned Friend, with his uſual art has thought prudent to keep back: but I truſt you ſee enough of the preſent caſe to induce you to weigh with attention the Honour of the Gentleman that you have in your hands, whoſe character my learned Friend has been inſtructed not to impeach.—In that he has acted with the ſame wiſdom as in ſuppreſſing the real merits of the cauſe; becauſe if he had attempted to impeach it, he would have revolted againſt the feelings, and oppoſed the underſtanding and knowledge of thoſe whom I addreſs.—Gentlemen, my learned Friend thinks to obtain ſatisfaction from you, by ſuppreſſing the real motives and the real cauſe of the action; and he hopes, that Men of Honour will for a blow give ſuch damages as may convey to the world their opinion upon another ſubject, or which at leaſt may be made uſe of by thoſe who dare not meet the truth. I ſay, Dare not meet the truth; becauſe I have Mr. Howe's authority for ſaying that he has not only fled from the ſpot upon which the act was done; but he has fled from the means which his own underſtanding ſuggeſted, and which his own reaſon approved, which he propoſed, and which Mr. Dive aſſented to, as the only one that could vindicate his character from the vileſt and fouleſt reproach. You will not take along with you what my learned Friend ſtated, that it was only a tread upon the toe: there was a vaſt deal paſſed which impreſſed a thorough conviction upon the mind of Mr. Dive, from which he acted, and which you, as Men of Underſtanding and Honour, muſt feel.—Gentlemen, though my learned Friend has ſuppreſſed the cauſe of offence, you will be able ſufficiently to collect it from the Witneſs: he ſays, That a cauſe of offence was inſinuated of a very different kind. A word expreſſive of the crime imputed certainly was not uſed in the preſence of Mr. Howe; but the language was ſuch, that Mr. Howe muſt have been in a phrenzy if he did not underſtand it: his conduct has marked that he did underſtand it; and it is in vain for him to affect a ſurpriſe, it is in vain for my learned Friend to affect a ſurpriſe of the real cauſe of this action. Mr. Dive certainly ſuſpected from the previous conduct in various inſtances of Mr. Howe, that he meant to ſolicit his concurrence in an unnatural crime. The language proved by the Witneſs, leaves not a doubt upon the mind of any man that hears me, that that was ſufficiently underſtood at the time. Could it be a ſlight accidental offence that induced Mr. Dive to uſe the language, "Turn the fellow from the "ſtand, a ſcoundrel! a wretch! that ought "not to be ſuffered to remain in the preſence "of Gentlemen, or of any man?" He inſtantly turns him out: Mr. Howe flies; Mr. Howe acknowledges he was not fit company for Gentlemen. Yet you are now called upon to give damages that ſhould expreſs your approbation of Mr. Howe. When a man demands your verdict in vindication of his character, but inſtructs his Advocate to ſuppreſs the fact, I find it my duty to call it forth and to inform you, That the next record is for words which charge the Plaintiff with the crime of Sodomy; and by charging him in the ſecond perſon, it is impoſſible but that Mr. Howe muſt have known the charge at the time. His Counſel however is inſtructed to attempt the ſuppreſſion of it. I ſhall therefore conſider this action as it really is; an action brought to vindicate Mr. Howe's character from that imputation: and I ſhall demand of you what damages you ought to give under that impreſſion. I ſhould ill diſcharge my duty to my Client, and I ſhould feel that he did not act the part of a Man of Honour, if he did attempt to conceal his conduct. Gentlemen,

tlemen, the injury my learned Friend has opened to you is not an injury to the perſon; for he confeſſes that the blow was ſlight; that no miſchief followed. From the ſtate of the Advocate therefore you find that it is not an injury to the perſon you are to redreſs, but an injury to his character. What that injury is, under all the circumſtances, is the ſubject for your deliberation. I feel that it is impoſſible for you as Men of Honour and Gentlemen, to ſuffer yourſelves to form a judgment upon ſo delicate a ſubject, where the honour of a Gentleman is at ſtake, without a full inveſtigation, minute information, and perfect conviction upon your minds. Yet, whence is the cloud? Where is the difficulty? It is thrown upon the cauſe by the man who in the character of Plaintiff, demands your verdict, and demands it upon a ground which he inſtructs his Advocate to ſuppreſs, and dares not ſtate in a Court of Juſtice. I ſhall ſtate therefore the real caſe. You are not to enquire into the conduct of a man who was actuated by any motives of malice or perſonal reſentment; for it is confeſſed that the parties were ſtrangers to each other. Mr. Howe being a Gentleman, Mr. Dive muſt know that what he did was at the hazard of life: and nothing leſs than the ſtrongeſt ſuſpicions could direct the conduct that he has held. You will lay aſide thoſe caſes, where wanton inſult has been offered by men who were not neceſſary actors in the ſcene. Mr. Dive was a neceſſary actor; but he has been too haſty it ſeems. Mr. Dive was certainly a neceſſary actor in the ſcene; but, if his conduct had been ſuch as my learned Friend thinks he ought to have obſerved, what would have been the effect? Would you have had him wait till the eyes of others had caught the tranſaction? till the opinion of thoſe around had involved him in the ſuſpicion? If, inſtead of damages againſt him, you could inflict the rack and tortures by your verdict, he would not riſque the hazard of the ſuſpicion to avoid it. But wealth and honours, it is ſaid, have raiſed Mr. Howe to a rank that demands your attention! Rank and honours give pre-eminence—engage the attention of others. The man of rank, conſcious that he acts in the view of his fellow citizens, naturally aſſumes a ſuperior propriety and dignity of conduct; he is ambitious of applauſe, and zealous to deſerve it; until a deſire of well-grounded fame becomes the ruling principle of his life—the ſettled habit of his ſoul. This is the temper which our law recognizes as hereditary in the peerage, when it regards the honour of a Peer as equivalent to the ſanction of an oath.

But apply this doctrine to Mr. Howe, how does he ſtand? how does he appear? Self-degraded, ſelf-debaſed, avowing himſelf a wretch who has no feeling for the opinion of others, who has no ſenſe of honour, who has none of the elevated ſentiments becoming his rank, yet claims from you a verdict founded upon that high rank.

Wealth too is urged—the fortune of Mr. Howe.—We diſturb, I ſuppoſe, the voluptuous enjoyments which that fortune affords!—The fortune of Mr. Howe! Is that a ground for demanding damages? Such reaſoning, by attempting to raiſe the individual, degrades humanity. Are men to be eſtimated like the beaſts of the field? Is the value of man to be eſtimated like that of an ox by the paſture on which he feeds? Injuries like this muſt be judged from the feelings of Mr. Howe's mind; and then the ſlighteſt coin will be an abundant compenſation for any injury he has ſuſtained.

But it is my duty to warn you that you are not trying the conduct of Mr. Howe; that you are not forming an eſtimate of his character; you are not deciding whether Mr. Howe be innocent or guilty. If you were, his own conduct is ſufficient to direct your deciſion.

You are not, however, forming a judgment upon him; but you are to pronounce whether the conduct of Mr. Dive was criminal. This action is not founded upon an injury to property, that can be eſtimated or meaſured: but is of a vindictive nature, it is of the nature

of a puniſhment; and the object of it is, to inflict a puniſhment upon Mr. Dive. What is the conduct you would have him obſerve? Would you have him ſtand patient after advances have been made, until the eyes of others caught him, until he was involved in the ſame ſuſpicion, and till he was treated as Mr. Howe, driven from the ſociety of mankind?

Mr. Peckham. I am extremely ſorry to interrupt you; but it is not the practice to ſtate things which you cannot, and which you will not attempt to prove.

Mr. Rous. Am I to take this action to be brought merely for the blows; and that it has no connection with the words?

Mr. Peckham. You know how I ſtated it.

Mr. Rous. I am not to take it from the Plaintiff's Counſel, but from the teſtimony of the Witneſs; and I conceive from the teſtimony of that Witneſs, that Mr. Dive expreſſed, at the time, an offence of a very different nature; that Mr. Howe did not inquire into the nature of that offence, nor ſpeak to any body, but fled. It is not poſſible that he ſhould not know the cauſe: he did know the cauſe before the bringing of this action; for he applied to the party for redreſs, as appears by his letters.

Mr. Peckham. You will produce the letters, if you open them.

Mr. Mingay. He will open what he likes: if it is not proved, it ſtands for nothing.

Mr. Peckham. I ſay, if he does open them, it is but fair to give them in evidence.

Lord Mansfield. You know nothing of what he will prove till it is opened. I think there is nothing in the objection: he has a right to open his cauſe as he pleaſes; but if he opens that which he cannot prove, a much inferior Jury to this would reject the whole of it.—— What is the next cauſe?

Mr. Mingay. The next is an action for calling him a B-gg-r-r.

Lord Mansfield. Is it to be tried by the ſame Jury?

Mr. Mingay. Yes, my Lord.

Lord Mansfield. Then you may try both actions together, if it is agreed to try them by the ſame Jury.

Mr. Mingay. It is in writing agreed, that the ſame Jury ſhall try both actions; and it is for the honour of Mr. Howe that it ſhould be ſo.

Mr. Rous. If I am not to enter into this ſubject, the caſe is very ſhort.

Lord Mansfield. I don't preclude you: go on according to your own judgement. If you open what you cannot prove, you are very wrong; for you ought not to catch the Jury in one cauſe by opening another; but, if it is the ſame Jury, it may vary the caſe.

Mr. Rous. Gentlemen, I feel myſelf not a little embarraſſed; becauſe I apprehended the real queſtion Mr. Howe meant to have your judgement on, was to vindicate his character. The ground upon which I ſhould have ſubmitted, that no damages ought to be given againſt my Client, would have been, that you are not to try the conduct of Mr. Howe, but the conduct of Mr. Dive, upon whom there is no imputation. You can now conſider this only as a trivial aſſault, and merely an aſſault: therefore I ſhall reſerve what I have to ſay for the other cauſe, and ſhall only ſubmit to you, that where the Plaintiff himſelf ſuppreſſes the real cauſe upon which you are brought here, where he proves merely a blow, and that he fled upon the imputation of an offence very different from that inſinuated by his Counſel, and when no explanation has enſued, you will not, you cannot expreſs an opinion, eſpecially as all light and all evidence are with-held from you, that ſhall condemn Mr. Dive, or affect his honour. I truſt therefore your verdict will be for nominal damages in this cauſe; and that you will call upon them to enter upon the other, which is the real queſtion between the parties.

Lord

Lord Mansfield. Have you any evidence?

Mr. Rous. No, my Lord; I ſhall call no evidence.

Lord Mansfield. Then there is no colour for all your opening about any cauſe whatſoever. The next thing is, Whether the Counſel for the Plaintiff chuſe (the Jury being the ſame) to take both cauſes together; or do they chuſe to have a verdict firſt for the aſſault, and then to go into the other cauſe? It is a matter of judgement and diſcretion. I cannot do it without conſent: you cannot have both cauſes before you, before you determine one, but by conſent of both the parties.

Mr. Peckham. I muſt beg leave to mention, that, though in this action we are entitled to recover, yet in the other we may fail in our proof; we muſt not therefore be bound by the event of the next cauſe.

Lord Mansfield. Though they ſuſpend their verdict upon one, till they give their verdict on the other, they will give their verdict juſt as they ought to do in both.

The Jury were then re-ſworn in the next Cauſe.

Mr. BOND.

Mr. BOND.

MAY it pleaſe your Lordſhip and you Gentlemen of the Jury, the declaration ſtates, that the Plaintiff John Howe, Eſq. was a man of good credit and reputation; and upon the 24th of May laſt, the Defendant, George Lewis Dive, publicly, in the preſence of many perſons, ſaid of him, that 'he attempted to b-gg-r me.' There are other words of the ſame import, laid different ways. The damages are laid at 5000*l.* to which the Defendant has ſaid he is not guilty: thereupon the iſſue is joined.

Mr. PECKHAM.

Gentlemen, I have ſo firm a reliance on your juſtice and good-ſenſe, that I am not alarmed at the cenſure which has been thrown both on Mr. Howe and myſelf. And I am certain that you will not ſuffer any imputations to affect him for error in judgement in me.

It has been imputed to Mr. Howe, that he has brought two actions.—He has brought two actions, becauſe Mr. Dive has added injury to inſult, by a cruel attack on his character, as an apology for a wanton aſſault on his perſon.

It has been imputed to me, that I brought forward the action for the aſſault, yet cautiouſly ſuppreſſed the evidence which might have tended to exculpate Mr. Dive, or at leaſt to mitigate the damages.

I confeſs, Gentlemen, my conduct was actuated by very different motives, and I ſhall be indeed unfortunate if it does not meet with your approbation. I conſidered that Mr. Dive had without provocation aſſaulted Mr. Howe. I was conſcious that an action between two Gentlemen for a blow was uncommon. I conſidered the verdict was of real importance to ſociety. I preſſed for large damages, that it might be a precedent to follow, or an example to avoid, if any young man ſhould meet with the ſame inſult. But I did not think myſelf juſtified as an Advocate even to allude to this action while we were trying the aſſault. It would have been uncandid to miſlead your judgement by inflaming your reſentment againſt Mr. Dive, by ſtating the double injury he had done Mr. Howe. I knew the attack upon the Plaintiff's character was not the queſtion you ought then to determine; and it was out of tenderneſs to Mr. Dive, that I did not mention it, becauſe I was not willing to enhance the damages more than they ought to be for the aſſault.

But it is ſaid, that I ſuppreſſed, and Mr. Howe dared not tell the truth. The aſſertion was rather inadvertent, as this cauſe was to be tried the moment after the other was finiſhed. Did not Mr. Howe dare to meet the truth? Does he wiſh to ſuppreſs that which gave riſe to the aſſault, when he comes boldly into a Court of Juſtice, and defies Mr. Dive to juſtify the words he has ſpoken?

Gentlemen, I will now refer as little to what paſſed in the laſt action, as I then cautiouſly avoided ſaying any thing relative to this: but it is neceſſary for me to ſtate, That after Mr. Dive had beat Mr. Howe out of the ſtand, Mr. Dive, in anſwer to ſome Gentlemen who naturally enquired into, and who were amazed at his extraordinary conduct, told them that Mr. Howe had made an attempt on him, in the words which my learned Friend has opened, but which I do not wiſh to repeat. You will naturally enquire what could lead him ſo very precipitately to make ſo dreadful a charge againſt a Gentleman? Mr. Dive could not do it wantonly; becauſe he is too worthy a man to aſperſe ſo cruelly any individual: he could not do it maliciouſly, for Mr. Howe was a perfect ſtranger. I ſuppoſe he did it from miſtake: but whatever was the reaſon, or whatever operated upon the mind of Mr. Dive, the charge being once made was equally fatal to Mr. Howe. I am ſorry to mention, that about that time the crime imputed to him was become ſo much the ſubject of general converſation, that I believe it made every man more circumſpect. In reſpect to myſelf, I declare that I never find myſelf in a croud, but I hold my hands over

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my head, to the manifeſt riſk of my pocket, leſt I ſhould inadvertently touch the breeches of another, and expoſe myſelf to imputation from men who judge as precipitately as Mr. Dive. But when a ſubject is frequently talked of, it makes a greater impreſſion on the imagination than it otherwiſe would. When a man's ſuſpicion becomes awake, then trifles light as air are confirmation ſtrong. The vigilance of Mr. Dive's ſuſpicions ariſing from frequently converſing on the ſubject, probably induced him inadvertently and precipitately to conclude that Mr. Howe muſt intend that, which in the cooler moment of reflection Mr. Dive's better judgment would revolt at.—Gentlemen, this is a queſtion of character—a queſtion of honour—a queſtion of what is more dear to a man than life. I kept it back in the laſt action, becauſe it was irrelative; but I will now bring every thing forward, and let Mr. Howe ſtand or fall as he is innocent or guilty.

I have heard, and I will ſtate the reaſons that induced Mr. Dive to make the charge upon Mr. Howe. I will even call a Witneſs for the ſole purpoſe of relating Mr. Dive's own ſtory, while the impreſſion was freſh upon his mind. His apology was, that he had ſeen Mr. Howe upon the courſe in the morning; that he had met him upon another part of the courſe in the afternoon; that neceſſity impelled him, and decency induced him, to retire to a corner below the ſtand; that Mr. Howe retired to the ſame ſpot; that he returned to the ſtand, and ſoon after perceived Mr. Howe cloſe by him, and that he trod upon his toe. This is all the ground Mr. Dive had to found this cruel imputation upon. Let me aſk, whether theſe circumſtances thus ſtated, (and they cannot be more ſtrongly ſtated) are ſufficient to induce Mr. Dive, or any man living, to throw ſuch an imputation upon a perfect ſtranger. They met twice upon the race-ground. Might not the ſame accident that carried Mr. Dive to a particular ſpot, have carried Mr. Howe there likewiſe? Without an accident, might not the ſame reaſon draw the one, as well as the other, to the ſame place? When he withdrew from the ſtand, he did it from neceſſity. Mr. Dive does not mean to ſay, but that his conduct was perfectly innocent. Charity ſhould have induced him to ſuppoſe Mr. Howe's was equally ſo. But he trod upon his toe.—Is it impoſſible for a man to tread upon another's toe without being guilty of Sodomy?

If ſuch trifling accidents are to juſtify ſuch charges, if ſuch cauſes are ſuppoſed to produce ſuch effects, no man's character is ſafe. Where is the criminality ariſing from Mr. Howe's conduct in the ſtand, joſtled by a number of people who were more attentive to the race than to each other? Is it very wonderful that one man ſhould run againſt another, or preſs againſt another, or tread upon another's toe? Would it not be much more extraordinary, that Mr. Howe without any knowledge of Mr. Dive, without any acquaintance with him, in a public ſtand, before ſo many witneſſes, ſhould make an attempt upon his chaſtity? You cannot ſuppoſe him to be ſo weak, if ſo infamous, as to make an attempt upon a perſon whoſe appearance ſhewed him to be a Gentleman, and whoſe appearance muſt ſhew that he had no predilection for ſo deteſtable a crime.

Gentlemen, Mr. Howe ſtayed that day at the races; he appeared publicly at the coffee-houſe; he went the next morning to the races, and from thence to Ipſwich; but he had not the moſt diſtant idea or intimation of a charge of this nature, till he had been ſome days at his country ſeat in Suffolk, when he was told by a very reſpectable Friend of mine, Captain Stiſtead, who went purpoſely to acquaint him with the report, that he was very ſorry to hear the world ſpoke rather freely of him, and it was neceſſary for him to vindicate his character. Mr. Howe thought they only ſpoke freely of his courage, becauſe he was not anxious to ſeek for that gentleman-like ſatisfaction which many men would have demanded: but he was infinitely aſtoniſhed when Captain Stiſtead mentioned the report which is the cauſe of this action. Mr. Howe immediately went to London, and wrote to Mr. Dive. I will not ſuppreſs evidence; but thoſe letters which my learned Friend wiſhed to open in the laſt cauſe, yet would not produce, I myſelf will read to you.

you. He propoſed to refer the inveſtigation of his conduct, and of Mr. Dive's charge, to ſome Gentlemen of character. This was acceded to in Mr. Dive's anſwer, but was afterwards rejected by Mr. Howe, becauſe he ſays, "As I am well aſſured that you are not at all "inclined to retract your ill-grounded ſuſ-"picions, but perſiſt in aſſerting the juſtice "of the charge you have brought againſt me, "I think it abſolutely neceſſary the matter "ſhould undergo, in a Court of judicature, "an inveſtigation more ſolemn than that I at "firſt propoſed."

A word will explain to you the reaſon of Mr. Howe's altering his conduct. Mr. Smith, who I believe ſaw the blows given, and heard the words ſpoken, told Mr. Howe, that he had had a converſation with a brother of Mr. Dive, and that he underſtood from him that Mr. Dive perſiſted in what he ſaid, and did not intend to make any acknowledgement or apology whatever. Mr. Howe muſt have been worſe than a mad man to have ſubmitted to a reference, when Mr. Dive himſelf had aſſerted, that be the reference what it would, he ſhould ſtill perſiſt in the charge he had made; for by the reference, Mr. Howe would have been precluded from a more public vindication of his character. What has been the conduct of this *Self-debaſed Man?* I could have wiſhed my learned Friend would have ſpared the reflection till the charge had been proved. I have thrown no reflection upon Mr. Dive, I ſcorn it; becauſe I believe he was actuated by error, not malice. I wiſh, in this inſtance, my learned Friend had done me the honour to follow my example, and to have ſuppoſed Mr. Howe innocent till it had been proved that he was guilty. But what has been done by this ſelf-degraded man, who ſuppreſſes evidence, and is afraid to meet his accuſer? He brings an action againſt his accuſer: he ſays, Sir, you have injured me; you have robbed me of my honour: my peace of mind is deſtroyed: I am an outcaſt amongſt the people; I dare to call upon you in the face of the Public for having thus traduced me; I call upon you to juſtify what you have ſaid, or give me back my character unſpotted as you found it.

Has Mr. Dive juſtified what he has ſaid? Has he not had an opportunity to enquire? Was it not his bounden duty, either to make good his charge, or publicly to acknowledge that he was wrong? Should not he have enquired the character of Mr. Howe, and traced him from his infancy even up to manhood, at ſchool, at the Univerſity, in London, in the Country? Should he not have made enquiry of every man acquainted with Mr. Howe? Has he made that enquiry of any man? It would have been becoming and honourable for Mr. Dive to have purſued that conduct. It would be preſuming perhaps in me to chalk out a line of conduct for him; but I will tell you what I would have done: I would have enquired his character among his ſchool-fellows; I would have traced his conduct through the univerſity; I would have purſued my enquiry in Suffolk; I would have ſearched all his haunts in London; I would have ſifted all his friends and acquaintance, his neighbours and his ſervants: and if I had found any imputation upon his character, I would have branded him as a villain; I would have juſtified the charge in a Court of Juſtice; and though it ſhould not turn out to be a complete juſtification in law, it would be ſufficient to convince the world that I had not wantonly, wickedly, inadvertently, or precipitately accuſed him; and I would then have truſted to a Jury for the damages they would under thoſe circumſtances have given againſt me. But on the other hand, if I had found that Mr. Howe's character was unblemiſhed, and his conduct above reproach, I would have gone boldly to him, and ſaid Sir I have inſulted you; I have cruelly injured you, I have blaſted your fair fame: I cannot make you a compenſation: I confeſs I was too haſty: I have ſince examined into your character; I find it will not ſupport my ſuſpicions: I will make you the ſatisfaction of a Gentleman if you require it; but my death will be no atonement: Malice will inſinuate you have killed your accuſer to conceal your guilt: I will publicly declare, for Juſtice demands it of me, that I have irreparably injured you; that it proceeded not from malice, but miſtake; that on a

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ſtrict enquiry into your character, I find my ſuſpicion ill-founded; and I am infinitely more happy in acknowledging my miſtake, than I ſhould have been in the confirmation of the charge.

This is the conduct I ſhould have purſued; and I ſhould have gloried in my humiliation as the moſt honourable act of my life. But, what is the conduct of Mr. Dive? He has not deigned to follow that line of conduct, but has barely contented himſelf with denying that he ſpoke the words. When I ſay this, I do not mean to throw any imputation upon Mr. Dive; for I am ſure, in private company, or even here in Court, (if I could be at liberty to aſk him) he would not deny that he had ſpoke thoſe words, but would ſtill perſiſt in ſaying, "I "ſpoke the words becauſe I believed the fact." His legal adviſers however have put this iſſue only upon record: and now the defence of Mr. Dive is not a juſtification of his conduct, for he does not attempt to juſtify the words, but endeavours to ſcreen himſelf from damages by aſſerting that he did not ſpeak ſuch words.

Is this the conduct that ought to be purſued? Is it intended that we ſhould be bound down by the rigid forms of law, as you muſt be in actions for words—and, if there is only one material word changed or omitted, or if the recollection of the Witneſs ſhould not fully come up to the words as ſtated in the Declaration, is it now to be contended that Mr. Howe is to be burthened with the enormous guilt of this accuſation, and that Mr. Dive ſhould ſtand acquitted, if the Witneſſes ſhould not prove the identical words? I truſt Mr. Dive is, and his Counſel I hope are, far more candid, and will ſay—If you really prove that I have ſpoken words which conveyed that meaning to thoſe who heard me, I am above taking ſhelter under the words themſelves: Let me ſtand or fall upon the truth of the imputation I have thrown upon you; for I will not rely on your not being able to prove the words as ſtated in your declaration.—That is the conduct Mr. Dive ought to have purſued. Though it has been ſaid that Mr. Howe dares not meet the truth, yet Mr. Dive is now at liberty, though he is precluded by the record from a juſtification: for I will wave that advantage; and I dare him to bring any one man living, who ſhall inſinuate, or even whiſper any thing againſt the character of Mr. Howe.

Gentlemen, if Mr. Dive cannot throw any imputation upon the character of Mr. Howe, conſider the nature of the crime imputed to him, and eſtimate your damages accordingly. Mr. Howe is charged with a crime of ſo deteſtable a nature, that the faireſt character muſt receive ſome ſtain from it. Is there a man whom I now addreſs, clear as your characters deſervedly ſtand in the county in which you live—is there I ſay a man among you, that could ſupport the ſhock of ſuch an accuſation, when made by a Gentleman known and reſpected as Mr. Dive? Bad men will affect to credit the report, for the purpoſe of having the world believe there are worſe men than themſelves; weak men will believe it, for they will believe any thing; and even good men might be inclined to believe it, ſince they will not conceive it poſſible that any man ſhould throw ſuch an imputation upon another without the ſtrongeſt proof of guilt. Is there ſuch proof in this cauſe? Ought not Mr. Howe's damages to be great, when the circumſtances are of ſo trivial a nature, that taken ſeparately, they amount to nothing; connect them together, they are undeſerving of notice?. If it is poſſible that you ſhould be inclined to give ſmall damages, from that moment you devote Mr. Howe to irremediable deſtruction. I vow to God, I would ſooner be the moſt miſerable felon that is now to be tried in the other Court, than be that injured, innocent young Man! In one caſe, death would put an early period to his miſery and his ſhame: but Mr. Howe is not yet in the prime of life, and muſt look forward, not with pleaſure to a good old-age, not with hope to the honours he is to receive, but with deteſtation, horror, and diſmay to that life which God may be pleaſed to curſe him with. How will he dare to walk into the Houſe of Honour

nour, covered with ſhame! How will he bear the opprobrium of being a diſgrace to manhood, and the outcaſt of ſociety! Conſcious innocence is a wretched comforter: in my opinion, the conſciouſneſs of innocence renders a man's ſufferings more inſupportable. What torture ſo dreadful as to be looked upon with horror, and avoided as a peſtilence, for a crime he has never committed!

I conjure you Gentlemen to give ample damages; not for the purpoſe of enriching Mr. Howe, but for the purpoſe of vindicating his character, which knew no ſtain till this wild accuſation was made by Mr. Dive. You ſhall have the moſt honourable teſtimony of his character, from thoſe who have known him from his infancy; who have ever reſpected him, and ever will: but if you find ſmall damages he muſt be cut off from the ſociety of thoſe worthy friends; for however great their reſpect, however certain of his innocence, no man would dare to hazard his character by being in his company after twelve Gentlemen upon their oaths had ſaid that he deſerves the imputation by the ſmallneſs of the damages they have given.

EVIDENCE *for the* PLAINTIFF.

WILLIAM SMITH, *Eſq. ſworn,*

Examined by Mr. ERSKINE.

Q. Were you, Sir, at the laſt Epſom Races?

A. I was, Sir.

Q. When was it?

A. It was in May.

Q. Do you know Mr. Dive, Sir?

A. Perfectly well, Sir.

Q. Did you ſee him at the Races?

A. I did, Sir.

Q. Did you hear Mr. Dive ſay any thing of the Plaintiff, Mr. Howe?

A. Yes, Sir.

Q. Will you be ſo good, Sir, as to repeat the words to my Lord, and ſpeak what you heard Mr. Dive ſay of Mr. Howe?

A. Upon my going upon the leads of the ſtand, I found the people there in a great deal of confuſion. As ſoon as I came in, Mr. Dive ſaw me, and ſaid, "Oh, here is Smith: he will "tell us who that damn'd odd-looking fel-"low is." After deſcribing Mr. Howe, I ſaid, I know him perfectly well; he is as inoffenſive a man as lives in the world, I believe; and, if he has offended you, I believe it muſt be by miſtake. He is Mr. Howe, and will be Lord Chedworth, if he ſurvives the preſent Lord. Upon which Dive ſaid, Damn him! if he was Lord Chedworth, or Lord Devil, he ſhall not behave ill to me. I cannot tell what his exact words were, but they implied a full charge of a ſodomitical purpoſe; but I cannot recollect the words.

Mr. Peckham. What were the words, to the beſt of your recollection?

A. I rather think he ſaid, "He wanted to "b-gg-r me:" I am inclined to think ſo; but whether they were the words or not, the words he uſed implied the full ſenſe of that.

Mr. Erſkine. To the beſt of your remembrance, he made uſe of the words you laſt mentioned?

A. I believe he did.

Q. You ſwear you believe he ſaid thoſe words?

A. I ſwear I believe he ſaid them, but I cannot be poſitive.

Q. But you are poſitive what he ſaid amounted to it?

A. It implied a full charge.

Q. But you rather believe thoſe were his expreſſions?

A. I rather think they were.

Q. Do you remember ſpeaking to Mr. Howe upon the ſubject of an accommodation, or an explanation of the matter?

A. Yes, Sir; Mr. Howe came to my houſe in Beaufort Buildings, with Mr. White, Mr. Howe's uncle, and told me they propoſed having a meeting with Mr. Dive. I ſaid, I rather think Mr. Dive will ſcoff at it: I think you will not get him to an accommodation. They then told me they propoſed to have two or three friends to meet Mr. Dive with Mr. Howe, and aſked if I would attend. I ſaid I was too inconſiderable myſelf to attend in the affair; but if they could get two Gentlemen of conſequence to attend, I ſhould wiſh to be of the party, in hopes of bringing things

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to an accommodation or explanation. They then propoſed Sir Charles Bunbury and Sir Charles Davers. I do not know whether this is evidence or not.

Mr. Peckham. We wiſh to hear the whole.

Mr. Smith. Sir Charles Bunbury came to me, I believe that very day, and told me that Mr. Howe and Mr. White had been with him upon the ſame occaſion; that he had conſented to go; and that Sir Charles Davers was to be the other. I was ſtill apprehenſive Mr. Dive would not conſent; and I went in ſearch of Mr. Dive: I found his brother at George's coffee-houſe, and told him what was intended by Mr. Howe, and his uncle Mr. White. He ſaid, "Smith, my brother will come into no ſort of conceſſion, or any thing of that ſort; but will ſay, if he was miſtaken, he is very ſorry Mr. Howe was ſo unfortunate as to get a licking." Then I met Sir John Dyer, equerry to the Prince of Wales: I told him our intentions, but he ſaid he thought it would be uſeleſs. I went to Sir Charles Bunbury, and told him our meeting would be needleſs upon ſuch an affair, as I found Mr. Dive would not retract in the leaſt, or make any kind of conceſſion. Both Sir Charles Bunbury and Sir Charles Davers, when I told them this, were very much diſinclined to the meeting, in conſequence of which it was broken off. I then called upon Mr. White, and told him we declined being of the party.

Mr. Erſkine. You ſaid Mr. Dive ſaid to you, Who is this fellow? Upon which you mentioned to Mr. Dive, he was a very inoffenſive man. I take it for granted, upon your ſaying that, you had reaſon for ſaying ſo, that you had ſome acquaintance with Mr. Howe?

A. Sir, I have not been intimately acquainted with him, but I have known him ſome years: for this laſt year I have been rather intimate with him, and have introduced him to a very reſpectable Society of Gentlemen, Dr. Frampton, for inſtance, and others, when when I found Mr. Howe in public, where he was but little known.

Croſs-Examination.

Mr. Rous. What kind of man is he in character? Mr. Dive, I mean.

A. Oh! I believe the moſt peaceable man living.

Q. You ſay that you then told Mr. Dive who Mr. Howe was?

A. Yes.

Q. How happened it you knew Mr. Howe had been there?

A. Sir, upon going into the ſtand, I met Mr. Howe upon the ſtairs, who ſeemed particularly pale; I thought he was ill: I ſaid ſomething about the race to him, ſome trifling thing about the race; to which he made me no anſwer, but paſſed by me without ſaying a word.

Q. When you had learned what had paſſed above ſtairs, did not you think it ſtrange Mr. Howe ſhould not make you any anſwer?

A. I did obſerve it, I believe, to Mr. Dive, when he laid this charge againſt Mr. Howe. I think I ſaid, This accounts for his paſſing me in that ſtrange manner

Q. Were any motives for declining the meeting communicated to Mr. Dive?

A. Not as I know of.

Lord Mansfield. There was a very fair reaſon for the meeting being declined, given by Sir John Dyer, and the brother, and all of them.

Mr. Rous. I think that it will be the beſt way for the Plaintiff to end the whole buſineſs now by a reference.

Mr. Peckham. We muſt vindicate Mr. Howe's character, which cannot be done without a verdict with ſufficient damages.

Lord Mansfield. The only way of doing it is to hear Mr. Dive's ſtory.

Mr. Peckham. —which your Lordſhip ſhall hear from a Clergyman whom I ſhall expreſsly call for that purpoſe.

Lord Mansfield. Is there any Indictment?

Mr. Rous. There is not: but it ſhould be underſtood, that before he had notice of the action it was impoſſible to conſult upon it; when we had notice of the action, we met at Mr. Dunning's chambers, and he adviſed not to indict until the action was tried, as it would look like reſentment.

Lord Mansfield. I would have ſaid thus: that the ſuſpicions are ſuch as no man knows but myſelf; therefore I cannot juſtify in an action of words: I cannot give evidence of it in an action of battery; and there is no way of doing it but by indictment, *valeat quantum valere poteſt.*

Mr. Rous. He was adviſed to abide the event of an action: that being decided firſt, he could not be ſuſpected of ſwearing to avoid the conſequences: if he has been directed wrong, it was our fault, and my ground of defence to the Jury will be, that the cauſe cannot come in iſſue here.

Lord Mansfield. Go on with the examination.

Mr. CORNELIUS LANDER *ſworn.*

Examined by Mr. BOND.

Q. You was at Epſom races, I believe, upon the 23d of laſt May?

A. I was.

Q. Did you hear Mr. Dive uſe any ſcandalous words there?

A. I did.

Q. Repeat them.

A. They were both ſtrangers to me. One Gentleman aſſaulted the other very much. With that I ſaid to the Gentleman, "You have beat him enough! What has he done?" I then clapped hold of him by the arm—"Has he picked your pocket?" He ſaid, "No; but he has trod upon my toe; and, God damn him! he takes me for an Onſlow."

Q. Did he ſay any thing after that?

A. Not as I heard; nothing more than that; that was all I heard.

Q. This was at the time Mr. Howe firſt went out of the room, Sir?

A. Yes, Sir; I never ſaw Mr. Howe afterwards.

Q. Did you hear no further converſation?

A. No, I did not. That is all I know of the matter. I did not know one perſon upon the ſtand: I believe nobody knew me.

Croſs-Examination.

Mr. Mingay. Did you know Mr. Dive?

A. No, I did not know either party; neither Mr. Howe, nor Mr. Dive.

Q. Did you afterwards have the perſon of Mr. Howe deſcribed to you, ſo that you might know he was the perſon?

A. No, I never ſaw him after, from that day to this.

Q. How many days was this after the races began?

A. This was the Thurſday; I was only there one day.

Q. You don't know whether he was any more at the races?

A. No, I do not.

Q. Did you ſee Mr. Dive at the races the next day?

A. I did not go.

Reverend Mr. GREEN *called again.*

Mr. Peckham. Be ſo obliging as to tell his Lordſhip and the Jury what words paſſed between Mr. Dive and any other perſons, after Mr. Howe had left the ſtand, and Mr. Smith came up; *for I now will make Mr. Dive's own ſtory evidence.*

A. After Mr. Dive had done, and left off beating Mr. Howe, I ſaid, "For God's ſake! what is the matter? what has he done to you?" And he deſcribed what he had done to him in this manner—But I muſt firſt tell your Lordſhip, that the leads are above a room at the ſtand at Epſom; and below, there is another room, where they make coffee, and give any refreſhments that may be wanted. Cloſe to that is a little corner where people make

make water—"I went," ſaid Mr. Dive, "down to the room under the leads, and I found Mr. Howe at my elbow, looking in a very odd and particular manner up in my face: I thought he was an odd fellow. I went from that room, which is under the leads, into the corner, to make water; and I found him there, when I thought him a ſtill odder fellow. However, I went into the firſt room: he deſcended too from the leads."

Q. What room had he gone to?

A. The firſt room. I went on to the leads, from that room, up to the leads again.

Mr. Rous. Did you ſay Mr. Howe followed him?

A. I have not been aſked for that.

Mr. Mingay. He underſtands he is only to give evidence upon one ſide. Mr. Rous aſked, whether Mr. Dive ſaid Mr. Howe followed him down ſtairs? He ſays, "I don't give any account of that, becauſe I am not aſked."

Lord Mansfield. You muſt give an account of all you heard Dive ſay.

Mr. Green. I am now giving an account of all Dive ſaid. "I went up to the leads again: Mr. Howe was ſtill at my elbow; he looked me in the face, and ſtroked my foot." It was then that I heard Mr. Dive ſay, *You damn'd ſcoundrel! this is too much; you miſtake your man.* And then he ſtruck him.

Lord Mansfield. Then he called him a ſcoundrel, and ſtruck him?

A. And ſtruck him, and ſaid, *You miſtake your man.*

Mr. Peckham. Did Mr. Dive ſay any thing of Mr. Howe afterwards?

A. He only ſaid he was a damn'd ſcoundrel.

Q. Did he ſay any thing elſe?

A. I did not hear him.

Q. Do you know Mr. Howe?

A. I never ſaw him till the day this affray happened, and to-day in the court.

Q. Have you made any enquiry as to Mr. Howe's character?

A. I have, Sir, and it was a very good one.

Mr. Mingay. I don't mean to object to the evidence as to character, becauſe half the County of Suffolk are attending; but it takes up time unneceſſarily.

Mr. Peckham. Too much time cannot be engroſſed when ſuch a young man's character is at ſtake: therefore, Mr. Green, I ſhall again preſume to aſk you, Whether you have made any enquiry reſpecting the character of Mr. Howe? whether you have been ſtrict in that enquiry, and what was the reſult of it?

A. I have made enquiries of people whom I knew, that knew him at Oxford and in Suffolk, who all gave him the beſt of characters; but ſome of them ſaid he was an odd fox, an odd kind of creature.

Q. But no men made any imputation of this ſort?

A. No.

Q. Did Mr. Dive deſcribe what paſſed in the room under the leads?

A. Exactly as I have told you; and when he had done making water, he turned round, and Mr. Howe was at his elbow.

Q. Did he ſay any thing of what farther paſſed when he was making water?

A. No; only the odd manner that he was at his elbow in all theſe places.

The Honourable Mr. FOLEY *ſworn.*

Mr. Erſkine. Was you at the courſe at Epſom?

A. I was.

Q. Did you ſee Mr. Dive there?

A. I don't know him.

Q. You don't know his perſon?

A. I do not.

Q. Did you ſee one perſon beating another there upon the courſe?

A. I did.

Q. Upon the ſtand?

A. Upon the ſtand. I ſaw one perſon beating another.

Q. Did

Q. Did you know who it was?

A. I did not till afterwards.

Q. But now do you think you ſhould know the perſon that had been beat there?

A. No, I ſhould not; but I have been ſhewn the perſon ſince I have been here.

Q. That calls to your memory the perſon?

A. I ſhould not have known him. I was on the outſide; and the crowd got round, and I avoided it as much as poſſible.

Q. Did you obſerve any thing elſe?

A. I did not; I went away as ſoon as poſſibly I could.

Captain HEAD *ſworn.*

Mr. Bond. You belong to the Horſe Guards?

A. Yes.

Q. You have been lately at the Univerſity?

A. I was at the Univerſity at the ſame time Mr. Howe was.

Q. What character had he there?

A. I was not ſo particularly acquainted with him as a great number of others that were there; but every body thought him a very worthy man, a very inoffenſive man, but a man who was ſingular, and negligent in his dreſs.

Q. There was no imputation of any guilt whatſoever upon him of this kind?

A. Never, I am very ſure.—I was intimate with ten or twelve people who were intimate with him; and if any thing of that kind had happened, they would have known it.

Q. You have no reaſon to believe he would be guilty of any ſuch thing?

A. Certainly not.

Reverend Mr. CLARK *ſworn.*

Mr. Peckham. I believe you was at Oxford at the ſame time with Mr. Howe?

A. I was, Sir.

Q. Did you live on terms of intimacy with him?

A. Yes, Sir, I was very intimate with him.

Q. After the anſwer you have given me, I muſt beg pardon for the queſtion I am now going to aſk: What was his character?

A. I believe, as good a character as any man can have: and I believe him to have as rooted an abhorrence of the crime charged to him, as any man can.

Q. You ſay this from a perfect knowledge of him?

A. I think ſo, Sir.

Q. What ſort of a man was he at Oxford in other reſpects?

A. Mr. Howe had ſome ſingularities; he was very ſtudious, reſerved, and recluſe.

Q. Not given to vice of any kind?

A. By no means.

Captain HALLUM *ſworn.*

Mr. Peckham. You are a Captain in the Navy, I believe, Sir?

A. I am.

Q. Do you know Mr. Howe, the Plaintiff in this action?

A. Very well.

Q. How long have you been acquainted with him?

A. About eleven or twelve years.

Q. Where have you been with him?

A. At Ipſwich moſt part of the time.

Q. You live there?

A. I live there; it is my native place.

Q. Has Mr. Howe lived there ſince he left the Univerſity?

A. He has lived there about ſix years: he uſed to come up at the vacation, to ſee his Mother. I had but little acquaintance with him, except for theſe laſt ſix years?

Q. What has been his character at Ipſwich?

A. In general, exceeding good.

Q. Do you think that character was juſtified by your knowledge of him?

A. I certainly know it is.

Q. And you believe it to be very juſt?

A. Very juſt indeed.

Q. Did you ever hear any imputation of any criminal kind caſt upon him?

A. No, never at all.

Mr.

Mr. PRENTICE *ſworn.*

Mr. Peckham. You are a Gentleman that lives in Suffolk?

A. Yes, Sir, I am.

Q. Are you acquainted with Mr. Howe?

A. I live, Sir, almoſt next door to him.

Q. How long have you known him?

A. About two years and a half, or three years.

Q. What is the character he bears in Suffolk?

A. He has as good and reſpectable a character as any man in the town and neighbourhood.

Q. Did you ever hear the moſt diſtant imputation thrown upon him, of the ſort you have now heard?

A. Not the leaſt in the world. I always eſteemed him as an acquaintance, and I value him as a friend.

Q. Is he a good deal in company, or ſtudious?

A. He is very ſtudious, he is a very reſerved man. There is ſcarce a day in the week but I ſee him: I have been very happy in his acquaintance; and I never ſaw any thing like what is imputed to him: I believe it to be as foreign to him as can be.

Mr. Peckham. Now read the letters.

N° I.

Letter written by the Plaintiff to the Defendant on the 7th of June.

" SIR,

" Being informed that you are the perſon " who aſſaulted me at Epſom Races on Thurſ- " day the 24th of May laſt, and that you are " the author of a moſt cruel report by which " you juſtified that aſſault, I take the earlieſt " opportunity of addreſſing you, in hopes of " obtaining ſome reparation for this very in- " jurious treatment. I remained ignorant of " this charge till laſt Sunday evening, when I " was informed of it, in the Park at Ipſwich, " by a Gentleman then juſt come from Lon- " don. This ignorance will not appear very " wonderful when you recollect, that at the time " of committing the outrage, you aſſigned no " ſuch reaſon for it within my hearing. It " was therefore with no leſs ſurpriſe than hor- " ror that I heard of it. My conſcience be- " ing perfectly clear of the imputed crime, " my reaſon tells me, that the moſt efficacious " method of reſcuing my character from in- " famy would be by a diſpaſſionate examina- " tion of the affair, which I earneſtly deſire " ſhould take place before any ſet of Gentlemen " that you ſhall propoſe; and the more ſevere " and public the teſt is, the more willingly I " ſhall abide it. If you ſhould reſiſt this ap- " plication, I muſt then have recourſe to ſuch " other means as ſhall be left me, as it is im- " poſſible for me willingly to acquieſce, as I " have hitherto unknowingly, under ſo grievous " and ill-founded an aſperſion; for I truſt that " you yourſelf, upon recollection, will think " you have been too haſty, and have drawn " concluſions which were no ways warranted " by the circumſtances which you hold out as " the ground of your opinion. In expectation " of full ſatisfaction from your juſtice and " cooler reflexion, I remain,

" SIR,

" Your obedient Servant,

" JOHN HOWE."

N° II.

The Defendant's Anſwer.

" SIR,

" I have this moment received your letter, " and am obliged to go down to Leatherhead " this eve; but any day you will fix for an in- " veſtigation into this affair, by your appoin t- " ing two Gentlemen, and I as many, will be " at any place you think proper, letting me " know before at Leatherhead; and am,

" Your humble Servant,

" GEORGE LEWIS DIVE."

No. III.

Letter written by the Plaintiff 10th of June.

" SIR,

" Being well aſſured, ſince I received your " favour of the 8th inſtant, that you are not " at all inclined to retract your ill-grounded " ſuſpicions, but perſiſt in aſſerting the juſtice " of the charge you have brought againſt me; " I think it abſolutely neceſſary that the matter " ſhould undergo, in a Court of Judicature, " an inveſtigation more public and ſolemn than " that which I at firſt propoſed. I am,

" SIR,

" Your humble Servant,

" JOHN HOWE."

Mr. ROUS.

May it pleaſe your Lordſhip, and you Gentlemen of the Jury, to favour me on the part of the Defendant: and, before I enter upon the caſe that has been proved to you in evidence, I feel myſelf under a neceſſity of exculpating my Client for purſuing a conduct which I adviſed, and exculpating myſelf for the language I have held. It is imputed to my Client, that he has not preferred an indictment.

Lord Mansfield. We have the whole of the caſe now before us; and I am clear that I know the reaſon why an indictment was not brought. I am very glad the Jury will now have the whole matter before them—I never heard evidence more accurately given than by Mr. Green.

Mr. Rous. I muſt ſtill take the blame upon myſelf—all the blame, if any is due, for not having preferred the indictment.—The advice was firſt given by Mr. Dunning, a man as eminent in the profeſſion, of as great knowledge, and of as accurate judgment, as any man exiſting in this country.—I am proud to ſay, I approved that advice. I did not think it became Mr. Dive, after a propoſal made to refer the whole to indifferent gentlemen, after his acceptance of that propoſal, when Mr. Howe declined the mode of inveſtigation propoſed by himſelf, and reſorted to an action—I did not think it became Mr. Dive to give his evidence before a Grand Jury on ſo delicate a ſubject, while a ſuſpicion might ariſe that his teſtimony could poſſibly be influenced by his intereſt in a cauſe depending. Whether this opinion be juſt, or not, Mr. Dive's conduct was correctly proper:—he would not allow himſelf to form a judgment; but in a matter affecting the honour and character of another, in which himſelf was a party, choſe rather to act under the direction of others, who adviſed according to the beſt of their underſtandings, than follow perhaps his own inclination.

Before theſe Aſſizes there was no poſſible means of preferring an indictment. The tranſaction paſſed in May, and upon the 8th of June the letter was written, containing an offer to refer the whole to indifferent Gentlemen; an offer which was inſtantly accepted. Within two days a ſecond letter was received from Mr. Howe, in which he declared, that he ſhould ſeek redreſs in a Court of Juſtice. When the cauſe was depending, inſtead of endeavouring to preoccupy your minds in the character of Grand Jurymen by evidence which in your preſent capacity you could not receive, he adviſed with thoſe, who from their habits of life, and from experience in this kind of buſineſs, he thought beſt able to direct his judgment. Whether they have erred or not, I care not, becauſe I truſt your juſtice will not impute as a crime to Mr. Dive what in truth was our act. As far as concerns myſelf, I feel no apprehenſion, whatever authority may deliver a contrary opinion. I do not ſuſpect my reputation will ſuffer by concurring in opinion with Mr. Dunning. Under the ſhelter of his name I ſhall repoſe in perfect ſecurity. But, whatever judgment you may form of me, ſurely Mr. Dive would have acted a very indecent, unbecoming part, if he had ſet up his own opinion, and acted upon his own judgment,

judgment, againſt ſuch advice. You will therefore diſmiſs this imputation out of the caſe.

Another part of the caſe I truſt you will likewiſe diſmiſs. We have heard Witneſſes reſpecting the character of Mr. Howe. Whatever that character might have been, men who have been ſince proved guilty have born the like. I do not however wiſh you wholly to reject the teſtimony you have heard, in the opinion you may individually form of Mr. Howe's character: but your juſtice will induce you always to recollect, Mr. Dive was a perfect ſtranger to Mr. Howe; that, as he knew nothing of Mr. Howe's character, he could not therefore act upon that character. What is imputed to him, was done in the inſtant, under the impreſſions of a moment. You will therefore try Mr. Dive, who is a Defendant, not by the character Mr. Howe bears in the opinion of his friends, but upon the circumſtances of the caſe, and the conduct Mr. Dive has himſelf obſerved. You will likewiſe carry in your minds, that though Mr. Howe might poſſibly have juſt reaſon, from the opinion and advice of others, to decline the reference firſt propoſed by himſelf (in which, in my own judgment, he is greatly miſtaken) yet Mr. Dive acceded to it as the only part becoming a man of honour. He could not go againſt the ſentiments of his own mind, he could not debaſe his own character; he could not vilify himſelf; he could not make an acknowledgement which would have been condemned by the feelings of his own breaſt: but he was willing to do that which every man of honour ought to do; if it were a miſtake, to leave it to the judgment of indifferent perſons, to let them decide. Their opinion would be a protection to Mr. Howe's character; but Mr. Dive recanting his opinion without conviction, could have been none; it could only have degraded himſelf from the rank of a man of honour.

I am reproached likewiſe for the language I have held as if Mr. Howe was ſelf-degraded and ſelf-debaſed. I own, in a queſtion that is not a queſtion of property, in which it is impoſſible to meaſure the damages a man has ſuſtained, but where the whole depends upon feeling and ſentiment, it is fair and juſt to obſerve that the feelings of the man who applies in that action for redreſs, have not been ſuch as to call loudly for your attention. The obſervation was that of an Advocate—you will judge of its weight. But it is ſuppoſed by my Learned Friend, that by this obſervation I meant to encourage duelling, in a Court of Juſtice.—The profeſſed Duelliſt is an odious character; and I agree with my Learned Friend, that a manly reſiſtance to the opinion of the world, may upon ſome occaſions juſtly place a man upon a higher ground, in the eſtimation of others, than following the dictates of falſe honour, and calling another to an account. This was not the effect of my argument. The cauſe did not require an apology for duelling. If it did, I ſhould not want a very high authority for my ſupport.—*Fecerunt alii & multi & boni*, was the language of a very able and upright Magiſtrate, paſſing ſentence upon a criminal convicted of a challenge. Had Mr. Howe yielded to the indignant feelings of a man of honour who cannot bear reproach, who would prefer death and even a violation of the laws to the ſlighteſt diſhonour; the ſentiment is ſo congenial to every generous breaſt, he could ſcarcely have been condemned. This, however, was not my reaſoning. I did not propoſe Mr. Howe ſhould have recourſe to the ſword for the vindication of his character: but I ſaid, there is inherent in every generous ſpirit an indignant feeling, at the imputation of diſgrace, that diſdains all bounds, that ſhews in an inſtant he is incapable of ſubmitting to diſhonour, and prefers death to ignominy; and that this is the character which alone deſerves attention, when the cauſe reſpects the feelings of a man of honour, and when you are called upon as a Court of Honour to decide. This queſtion is not a queſtion of property. Mr. Howe's fortune, his expectation, his rank, his ſituation in life are ſuch, that if he wiſhed for pecuniary damages, he would degrade himſelf, he would deſerve the epithet I beſtowed of ſelf-degraded, and ſelf-

debaſed.

debaſed. He can only ſeek for reparation of his honour, for vindication of his fame, from the opinion of twelve Gentlemen of the County. But how does he ſeek this redreſs? My Learned Friend ſays, that he puts upon record the charge, he dares Mr. Dive to a juſtification, he calls upon him to prove the truth of what he has declared. But, Gentlemen, can you be ſo deceived? Can you be cheated of your underſtandings? Will you ſuffer your judgments to be ſo inſulted, as to conſider this as a mode of vindication, when he precludes the only poſſible evidence reſpecting the fact? Mr. Dive is the only perſon, who from the nature of the tranſaction could relate the circumſtances. Mr. Dive is made a party upon the record: he would therefore have been very ill-adviſed, if, upon a looſe opinion abroad, he had ventured to have brought that as a queſtion to trial, though Mr. Howe had at Ipſwich, (under the firſt impreſſion) dropped an expreſſion which would have ſtrengthened ſuſpicion. Capt. Stiſted is not called by them, becauſe I know what he muſt ſay; that Mr. Howe had dropped an expreſſion which confirmed the ſuſpicion, and proved that when he pretended to have no knowledge of the imputation, firſt communicated (as we are now told) by Captain Stiſted, he muſt have had a previous knowledge from the queſtion he aſked. But Mr. Dive could not bring forward this evidence; he could not attempt a juſtification, becauſe he had no witneſs, becauſe the nature of the tranſaction prevented all poſſibility of his having any other teſtimony than his own. You will not therefore venture to decide, where the only poſſible evidence is withheld, by the conduct of that perſon, who in the character of Plaintiff demands your verdict; who requires you to hold forth to the County your opinion of the tranſaction, yet will not allow your judgment to be informed; for I truſt you have a ſtronger ſenſe of honour, than to reſt your verdict upon the looſe recollection of a Witneſs relating what Mr. Dive is ſuppoſed to have ſaid. The true queſtion which you are to try is, whether Mr. Dive has acted a becoming part: and I truſt there is no man who thinks, that when theſe attempts are frequent, when they have been made in our theatres, and in public places, in the preſence of numbers, of all ranks and denominations, that any man, much leſs a Gentleman, is to ſtand patient, and bear that which will involve him in the ſame imputation. Should he wait until the eyes of others caught the tranſaction, he would be deemed equally criminal; the ſpectators would feel the ſame indignation againſt him; they would act towards him as they acted towards the other; he would become the outcaſt of ſociety, if he did not inſtantly reſent it. You will therefore take along with you what is admitted, and what is proved. It is admitted by my Learned Friend, that Mr. Dive acted not from malice, —not from reſentment—not from wanton or idle levity.—His was not the conduct of a man who might be ſilent, or might ſpeak, who choſe his part and took upon himſelf lightly to traduce the character of another. Mr. Dive was an involuntary party, compelled to act in the inſtant. Under the impreſſion of the moment he acted, and with a view to that impreſſion your judgment muſt be formed.

Now, Gentlemen, Mr. Green relates the circumſtances as well as he recollects them from the declaration of Mr. Dive: but you will obſerve, that throughout the expreſſions of Mr. Dive cover the particular circumſtances, as became a man feeling for his nature. It is impoſſible for a man, who has the feelings of a man, when it was not neceſſary, where he was not called upon by his duty to the community, where he did not appear as a witneſs—it was impoſſible for any man to relate minutely the circumſtances; and therefore Mr. Dive, as his converſation is related by Mr. Green, uſes this language: "I went "into the room, I found Mr. Howe at my "elbow; I went to make water, I found "Mr. Howe at my elbow." He does not relate minutely what there paſſed. And it would be unbecoming me to do it, becauſe the party who alone could prove it, being Mr. Dive, it is impoſſible for me to produce the

the evidence; but Mr. Dive covers, under the general language of *a very odd behaviour*, what was a groſs violation of decency and decorum. At that time Mr. Dive viewed Mr. Howe, as his dreſs beſpoke him, a man not of rank, not of eſtimation, not of fortune, not of education. It was poſſible that, however groſs, however beaſtly, however vulgar, his conduct might be, Mr. Dive, judging of Mr. Howe from his then appearance, thought it poſſible, that it might only proceed from an ignorance or contempt of decorum and the decencies of life:—but when Mr. Howe is repreſented as a man of character, as a man of letters, as a man of liberal mind, as one raiſed above the vulgar by the purſuits of his life, as a man of family, keeping the beſt company, early habituated to and falling mechanically into an obſervance of the decencies of behaviour;—what Mr. Dive obſerved and ſpoke of as a vulgar breach of decorum, becomes too monſtrous to admit of explanation. He followed Mr. Dive into the room above; he was then at his elbow: a ſingular accident, that the ſame man in a croud ſhould be firſt at his elbow in the firſt room, then behaving indecently below, then following him up into the room above, ſtill at his elbow. When Mr. Dive, deſirous of avoiding him, deſirous of avoiding the diſagreeable neceſſity to which he was at laſt reduced, moved into the room above, went to the leads, Mr. Howe is again at his elbow. Perfectly unacquainted with each other, no converſation between them, nothing that could draw them together, no common acquaintance upon the ſpot: for it appears in evidence, Mr. Dive did not know him, there was not a perſon who knew him in the room, and it was the accidental coming of Mr. Smith afterwards that informed them who he was. It is beyond all calculation this ſhould happen by accident. It exceeds all the power of arithmetic to calculate the chances, that Mr. Howe ſhould be ſo often, in ſuch various places, at the elbow of Mr. Dive by accident. Mr. Green dropped one fact.—Mr. Dive, ſtill deſirous of avoiding the diſagreeable neceſſity to which at laſt he was driven, removed to another part of the leads: he then found Mr. Howe again at his elbow. What was forbearance, what was moderation, what was a deſire to avoid involving his own name in a tranſaction that fixes diſgrace upon all who are named (and Mr. Dive is a ſevere ſufferer in mind, and I had almoſt ſaid in character, but you know him too well to permit his character to ſuffer) ſeemed no longer poſſible. Yet Mr. Dive ſtill avoided Mr. Howe.—What then paſſed? As it ſhould ſeem, for I ſpeak only of ſeeming: I don't mean you ſhould condemn Mr. Howe, but acquit Mr. Dive.—What, would any body have thought? and how could Mr. Dive act? Mr. Dive then finds not a tread upon the toe, as my learned Friend deſcribed it, not that which might accidentally happen in a room from joſtling of the company, (though ſtill extraordinary, five ſucceſſive times, Mr. Howe ſhould be ſo near) yet at this time he finds him ſtroking his foot, not treading, but ſtroking, and repeatedly ſtroking his foot—Why, Gentlemen, I profeſs I feel myſelf incapable to argue upon the ſubject; but in ſpeaking of what we know not, I ſuppoſe ſome reaſoning from analogy may be admitted from what we do know. Suppoſe the caſe of a woman who is followed from ſpot to ſpot, while in company, often looked in the face by the ſame perſon; is it poſſible that hands or feet can be uſed, without her knowing what is meant?—The human countenance is moreover ſo expreſſive of the paſſions, that, though one cannot deſcribe it by language, it is impoſſible to miſtake. In the inſtant under that impreſſion, with that picture before him, Mr. Dive reſents the inſult—If it were poſſible he ſhould miſtake, it was ſurely a pardonable error; an error which the ſubſequent conduct of Mr. Howe, muſt rivet in his mind.—Mr. Dive, as became him, reſented it in the inſtant.—Good God! I am reaſoning upon this ſubject! Nature has not left to reaſon the vindication of her rights. She has implanted an inſtinctive horror of the crime, which acts independently of thought—which reaſon was not intended to controul.—

Under this inſtinctive feeling Mr. Dive acted, and you muſt adopt the impreſſion to do juſtice to his conduct.

Mr. Dive, then, feeling the inſult, makes the imputation from the expreſſion that he uſes: "Do you take me for an Onſlow!" Was that an expreſſion that Mr. Howe could miſunderſtand, when the tranſaction alluded to was ſo notorious?

Lord Mansfield. It is not ſaid in evidence that Mr. Howe was preſent; it was after he was gone. It was no part of the converſation between them.

Mr. Rous. Gentlemen, Mr. Howe's mind was not in a ſtate to feel reſentment in the inſtant. Inſtead of ſaying, Mr. Dive, are you mad? are you in a phrenzy? inſtead of applying for an explanation—What is his conduct? He fled—fled in an inſtant; at the ſame time that expreſſions were uſed to him, that, if not incapable of being miſ-underſtood, were certainly very capable of being underſtood: *You damn'd ſcoundrel!—this is too much; you miſtake your man.* Mr. Howe meets Mr. Smith upon the ſtairs—Smith addreſſes him as an acquaintance. Was not he at that time recovered? Could not he go back for an explanation, under the protection of his friend, Mr. Smith? What had he to fear? If Mr. Dive was a mad man, and ſtruck him without provocation, there was no diſgrace in being ſtruck by a mad-man. If Mr. Dive was a gentleman, as he had reaſon to believe from his appearance, and the company he kept, the error was eaſily corrected. This done, Mr. Dive would have been the firſt man to have acknowledged the error, and to have redreſſed the injury as far as in his power; but Mr. Howe does not go back, though meeting Mr. Smith he muſt have known his name could no longer be concealed; which is the alledged reaſon of his flight. Mr. Smith, under the impreſſion of the moment, ſays, "Then that accounts for his looking pale and making no anſwer, and his ſtrange manner of paſſing me." The impreſſion upon Mr. Smith's mind, and the impreſſion upon the bye-ſtanders, from Mr. Howe's conduct was, it had the appearance of guilt. Mr. Dive, then, under this impreſſion, confirmed by the concurring ſentiments of thoſe to whom it was related upon the ſpot, expreſſed his opinion of Mr. Howe's conduct; and that is the offence which you are to try.—Now do you mean by your verdict to tell mankind, that under the circumſtances ſtated at this time, when the crime goes abroad and ſtalks in open day-light; when the ſuſpicion is ſo rife, that my learned Friend, whoſe honour, whoſe character, whoſe high ſpirit, are as univerſally known as his perſon, has fears of ſuſpicion, and would ſooner have his pocket picked than put his hands down, leſt accidentally he ſhould touch the breeches of another; will not you allow Mr. Dive alarmed and agitated by the ſame apprehenſion to vindicate his own character, to free himſelf from reproach, to expreſs the reſentment natural to an honeſt mind, to expreſs his abhorrence of the crime, when a moment's further patience might have involved him in the ſame imputation with Mr. Howe? Whether Mr. Howe be guilty, or innocent, God only knows. I know that I do not form my opinion from the judgment of Mr. Dive. I am not in the habit of taking opinions from the judgments of others; but I think, that if Mr. Howe had been guilty, the conduct he would have obſerved, is the conduct we have ſeen.

Mr. Howe retires to the country. When he is informed of the report which prevailed, his language is this: "Being informed that "you are the perſon who aſſaulted me at "Epſom, on Thurſday the 24th of May laſt, "and that you are the author of a moſt cruel "report, by which you juſtify that aſſault; I "I take the earlieſt opportunity of addreſſing "you, in hopes of obtaining ſome ſatisfaction "for this injurious treatment."—What is the ſatisfaction he requires? Feeling that, if Mr. Dive had erred, it was an error incident to the weakneſs of humanity, not to be puniſhed as a crime, or followed vindictively in a Court of Juſtice—Mr. Howe, feeling this, ſuggeſts his own remedy: "My conſcience being per-

"fectly

" fectly clear from the imputed crime, my " reaſon tells me the moſt efficacious method " of reſcuing my character from the injury, " will be a diſpaſſionate enquiry into the af- " fair."——Here, then, is the ſatisfaction which he himſelf demands as the moſt efficacious to vindicate his character. It is not a judgment haſtily taken up, but formed upon the deliberate advice of his friends. The letter is dated in June, near a month after the tranſaction, a conſiderable time after he heard of the imputation at Ipſwich; for this letter is written on his return to London. Deliberately, and with the advice of friends, he ſelects this mode, as the moſt efficacious to vindicate his character.

I will tell you why this judgment was right. If the cauſe be tried here, the firſt difficulty that occurs is, that thoſe who alone can relate the circumſtances to which your judgment is to be applied, which are to be explained by evidence, and done away by character, are parties, and as parties cannot be heard, It was more proper therefore that the inveſtigation ſhould be by indifferent Gentlemen, choſen by themſelves, not bound by the technical rules of legal evidence. Thoſe Gentlemen could have taken the whole of the circumſtances: they could not have been ſurpriſed, as we ſometimes are at *Niſi Prius*, by unexpected evidence: they could have adjourned from time to time: they could have minutely inveſtigated the ſubject: they could examine the character and conduct of the party through life. A judgment thus deliberately formed would have been a ſhield to protect Mr. Howe from the diſgrace that he has incurred; but the diſgrace which he has incurred cannot be done away by that which he has ſince demanded, an acknowledgment from Mr. Dive. What would any of you, or any man of honour, think of Mr. Dive, if, under the ſtrong impreſſion he had at the time, confirmed by the circumſtances which afterwards happened, he could have been baſe or abject enough, in the ſituation in which he ſtands, to have abdicated his own honour, and diſgraced himſelf by acknowledging that he had declared a falſehood? Unleſs he admitted himſelf to have ſpoken a falſehood, an acknowledgment of error could have no effect. If he had inſiſted his judgment formed at the time was ſtrong, it would be no relief to the character of Mr. Howe. Had he ſaid, that ſubſequent information had corrected that judgment, ſuch a declaration would have been imputed to other motives, and diſgraced the Defendant, but have given no protection to the character of the Plaintiff. Mr. Dive thought the opinion of perſons formed in the manner I have deſcribed, would have been a vindication of him for making any acknowledgment which their judgment might enjoin. He behaved throughout as became a Gentlemen, who had acted under the impreſſion of a moment *with perfect ſincerity*, who ſaw no reaſon to diſavow his opinion, becauſe he had no ſubſequent knowledge, no information, no means to correct his judgment: yet he deemed, that, as a man of honour, it became him to ſubmit to the tribunal that Mr. Howe had erected; to their ſentence, whatever it might be, he was willing to ſubmit.

Mr. Howe propoſed any perſons Mr. Dive would name: Mr. Dive refers the nomination of half the judges to Mr. Howe. Here likewiſe Mr. Dive acted conſiſtently with the feelings of a man of honour; and I vow, if I thought, in a caſe like this, he was capable of departing from that character, I would renounce his cauſe. Under the ſanction of ſuch an opinion, Mr. Dive could, conſiſtently with the feelings of a man of honour, make every ſatisfaction and acknowledgement that the judgment of thoſe indifferent perſons dictated. As he had committed his cauſe to their determination, he had ſubmitted to make them his Court of Honour: under their authority, and by their direction, he would have been perfectly juſtified, in the opinion of the world, to have made Mr. Howe every apology, had they pronounced him miſtaken, and deemed an apology proper. Why did Mr. Howe decline it? Cauſes have been ſuggeſted, which, being unknown to Mr. Dive, apply not to his conduct.

But

But I offer it at this inſtant, as the moſt efficacious, as the only poſſible mode of vindicating the character of Mr. Howe—and I will give up my Client, if like Mr. Howe he departs from that which his ſenſe of honour and judgment once approved; if he refuſes to adopt that tribunal, and ſubmit his cauſe to the deciſion of thoſe who have been propoſed. Some men of high rank and character, and ſevere honour, who have been named by Mr. Howe, ſhall be the judges on the occaſion. Mr. Dive will follow their directions: he will abdicate his own judgment.

Gentlemen, you are not to conſider whether Mr. Howe had any reaſon for withdrawing this reference, but whether Mr. Dive has acted improperly. The reaſon given is, that there was ſome converſation with the brother, what led them to believe Mr. Dive perſiſted in his opinion. Mr. Dive aſſures me, and I have no reaſon to doubt the aſſurance of ſuch a man as you know Mr. Dive to be, that he had no communication with his brother: he could not have had any communication at the time alluded to, becauſe that was the time at which they had agreed to ſubmit the whole to reference: and, while that was depending, it was impoſſible Mr. Dive could communicate any ſentiments that had the appearance of prejudging the caſe. The truth is, Mr. Dive never has mentioned his opinion to his brother, while the reference was thought of.

Gentlemen, you are called upon by my Learned Friend to vindicate the character of Mr. Howe. It is a ſingular mode of vindication, when men are to judge in the dark, when they are not to inveſtigate the ſubject by the examination of the only parties who can give them information; and yet this is the vindication which Mr. Howe requires and expects at your hands. Your verdict decides nothing: your verdict cannot vindicate Mr. Howe in the opinion of mankind. But you have in your hands the honour of Mr. Dive; and I truſt that is a ſacred depoſit, which Gentlemen of your character, rank, and figure in the county, will not violate. You may condemn Mr. Dive, may pronounce upon his conduct without evidence, and preclude, as far as your authority can operate, the future inveſtigation of this ſubject in a Court of Juſtice; but you cannot vindicate the character of Mr. Howe. You can eſtabliſh nothing in his favour, becauſe you muſt decide without knowledge.—Gentlemen, I truſt your verdict will be ſuch as will not condemn a man for protecting himſelf from reproach, will not puniſh a man for yielding to thoſe inſtinctive feelings which the God of Nature has given to vindicate the rights of Nature—feelings—which he who condemns, libels his Creator, and degrades his ſpecies.

EARL of MANSFIELD.

Gentlemen of the Jury, You attend on a queſtion that muſt be very diſagreeable both to you and to me; and it has become more entangled by the great latitude that has been taken on both ſides at the bar; for a great many things were opened, a great many things were ſtated, and a great many things have been gone into, that you muſt forget as faſt as you can, for you muſt try the cauſe upon the evidence.

Gentlemen, there are two cauſes before you, and I am very glad they are both before you at the ſame time. I think it was judicious in the Counſel to agree that the verdicts in each of them ſhould be at the ſame time determined: they are abſolutely of courſe. The firſt is for the Aſſault and Battery. There is no juſtification pleaded; and yet, if the fact was true, that the Plaintiff made an aſſault with an intent to commit Sodomy, it might have been pleaded, and would have been a juſtification for his repelling that aſſault: but there is no juſtification pleaded. Well; but, ſuppoſing it could not have been pleaded, yet it might have been given in mitigation of damages: but there is no evidence offered of any ſuch aſſault, even in mitigation of damages. Therefore, as it ſtands before you upon evidence, here is a groſs aſſault without any provocation, without any defence, without a word of evidence in mitigation of damages.

mages. But a vaſt deal was thrown out, and the world has heard a great deal of what paſſed at Epſom. I did therefore, in tenderneſs to both parties, and to get at the real truth if poſſible, wiſh to have both cauſes tried before the firſt verdict was given. I could have given that ſhort direction upon the action for the aſſault; but there was an application to have the other cauſe tried, to ſhew the colour of the matter, and to have your opinion as to who was in the wrong, for the purpoſe of increaſing damages upon the one ſide, and diminiſhing them upon the other. There was no evidence for diminiſhing; none at all; and, as I ſaid before, no juſtification, no extenuation of damages—no ſtep taken towards a proſecution—nothing done; and I had a great mind the other action ſhould come on, that you might ſee the whole of it. The other action is an Action for Words; and the words that are proved by the witneſs are very ſtrong words indeed; for they are theſe; "He wanted to b-gg-r me." Now, if that is true, he might have juſtified. That is not juſtified: but ſtill an addreſs is made to you, deſiring you to conſider, as if he really had attempted to commit Sodomy with him; and then his ſaying the truth, or ſtriking him for it, would not have intitled the Plaintiff to any damages. We had no evidence of what it was that induced him to think he wanted to commit Sodomy with him—no evidence at all of it: and under that impreſſion, I own I thought you was under vaſt difficulty how to get at a proper line of conduct; and I wiſhed there could have been a way of putting it, ſo that the evidence of the Defendant might be received: but in the progreſs of the laſt cauſe, the whole caſe came before you, and I think it comes very clearly before you: the whole truth is before you; and you will do that which in your diſcretion is right and juſt. When I ſay the whole truth, you will judge from the evidence of the Reverend Mr. Green, who ſaw the blows given, who heard what was ſaid when the blows were given; and when the blows were given, there was no cauſe aſſigned of any attempt to commit Sodomy, or any particular act, by name leading to it, but "You Scoundrel! you Raſcal! you ought to be turned out." It might have been thought to proceed from that; but the Witneſs Mr. Green, with great accuracy, when the Counſel interrupted him, ſaid, I am telling all that Mr. Dive ſaid to me. The account that Dive gives of it to Green, is this: "I went down to the room under the leads; I found Mr. Howe at my elbow, looking me in the face in a very odd manner: I went from that room under the leads to make water; I found Mr. Howe at my elbow: I returned into the firſt room I had gone into from the leads; and I went up to the leads, and Mr. Howe was at my elbow: he looked me in the face, and ſtroked my foot, and then I called him Scoundrel, and ſtruck him." Now here is the whole account of what Dive ſays in his own juſtification: he tells his own ſtory; he tells all the particulars; and the Counſel for Mr. Howe has made that evidence, for otherwiſe it would be no evidence at all: but they have permitted that evidence to be given. What does he ſay were the grounds for his ſpeaking of him in this manner, and for his ſtriking him?—Why, theſe are all the grounds. Now, as theſe grounds ſtand, the Counſel, in anſwer to it, have ſupplied the converſation; they have told you a great many other things were ſaid and done, and introduced fiction into the cauſe; for every thing is fiction that is not proved: but this is the ſtate of the evidence. Upon this ſtate of the evidence, as it ſtands, there is no colour to ſupport an indictment for an aſſault with intent to commit Sodomy. What ground is there to ſupport ſuch an indictment? The looking oddly in his face.—All the witneſſes ſay he is a very odd-looking man: ſome ſay he was a very odd fellow; others ſay he is an odd fox; others ſay he is aukward, ungainly; and other expreſſions of that kind. But looking oddly in Mr. Dive's face, and treading on his foot, without ſomething or other beſides to induce him to think ſo, is not a ſufficient ground for ſuch an imputation: the Defendant took it wrong; he miſtook appearances. This is a cruel injury done to the Plaintiff: and

what ought to have been done immediately ſhould have been this;—to have examined into all the particular circumſtances, and afterwards to have adapted them to the nature and character of the man, and to have made a reparation. That is the idea in the letter from the Plaintiff: but that goes for nothing; becauſe, though the idea was right, yet there was a ſufficient ground for dropping it, without affecting the Defendant: but the Plaintiff was no way to blame, becauſe he was told by the Defendant's relations and Brother, that he would not retract; and you have heard now his Counſel ſay, he could not poſſibly retract. What ground then was there to go before two Gentlemen on a ſide, (as it appears upon the evidence, was the offer made) for their opinion, when it was contrary to his own feelings? He ſays he cannot retract, becauſe it was his judgment at the time. That juſtifies the ground upon which the Plaintiff proceeded in his laſt letter; for it was to no purpoſe to go to any reference to any particular Gentlemen: it would ſignify nothing what any other perſon ſhould think of it. But you have now, which I am exceedingly glad of, you have the whole of the grounds, as given by Mr. Dive himſelf, why he ſaid he attempted to commit Sodomy, and why he ſtruck him in that manner: and with thoſe grounds, of courſe, you muſt find a verdict for the Plaintiff in both actions; and the damages are in every caſe, but moſt emphatically ſo in theſe cauſes where they are both put together, to be determined by your ſound diſcretion: you therefore will give what damages you think proper; but you muſt give damages in each.

The Jury brought in a verdict for the Plaintiff in the firſt Cauſe; Damages 50 £. and Coſts of Suit.

In the ſecond Cauſe, 500 £. and Coſts of Suit.

Mr. Howe addreſſed his Lordſhip in the following words: "I did not, my Lord, commence theſe actions for the ſake of pecuniary ſatisfaction. No money can make me amends for the feelings I have undergone. Theſe verdicts will, I hope, convince even the malevolent of my innocence. The damages therefore I wiſh to give to any public Charity which your Lordſhip will pleaſe to direct."

Earl of Mansfield. You do very right; but the application ſhall be for the Jury's conſideration.—Gentlemen of the Jury, you have heard what Mr. Howe has ſaid, That no pecuniary ſatisfaction was an object, nor could be a compenſation to him: therefore, whatever might be the damages, he wiſhed they might go to ſuch charity as the Court ſhould direct. You are the propereſt branch to direct to what charity it ſhould go.

The Jury then deſired that the damages might be divided between the Diſpenſatory for the County of Surry, and the Marine-Society; which Mr. Howe promiſed ſhould be done.

THE END.